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in the

Supreme Court
of the
United States

October Term, 1983

EMANUEL BARSHOV
and
JAMES E. ROSS,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER A DEFENDANT'S RIGHT TO A FAIR TRIAL IS VIOLATED BY A PROSECUTOR'S REFERENCE, IN CLOSING ARGUMENT, TO THE DEFENDANT'S ACTS IN CONFORMITY WITH A "SAFE HARBOR" FEDERAL CIVIL TAX REGULATION FOR THE PURPOSE OF PROVING A "CRIMINAL DESIGN," WHEN THE REGULATION WAS A CONGRESSIONAL AND ADMINISTRATIVE CIVIL DESIGN TO BE ADHERED TO UNDER THREAT OF CIVIL PENALTY.

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OPINION BELOW

The Opinion of the Court of Appeals is attached to this Petition as Appendix A. The decision is reported: *United States v. Barshov*, 733 F.2d 842 (11th Cir. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1984. A Petition for Re-hearing was denied on July 11, 1984. A motion by Mr. Ross for stay of the issuance of the mandate pending petition for writ of certiorari was granted to and including August 17, 1984. This Petition for Writ of Certiorari was timely filed within 60 days of the denial of rehearing and on or before August 17, 1984. Supreme Court Rules, 20.1. Jurisdiction is invoked pursuant to 28 U.S.C.§1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

REGULATION INVOLVED

Withdrawn Proposed Treas. Reg. §1.46-3(e)(7)(iv)(b), *explained in*

KOPPLE AND STIGLITZ, TAXATION OF THE MOTION PICTURE INDUSTRY 35-36 (B.N.A 1978)



See Appendix B

STATEMENT OF THE CASE

1. Introduction

This Petition seeks review of a Court of Appeals opinion affirming a District Court decision denying a motion for mistrial made after the government's closing argument in which it sought to have the jury draw inferences of the defendant's criminal intent by reference to the defendant's acts in conformity with a "safe harbor" civil tax regulation to prove a criminal design, in combination with a reference to the IRS's disallowance of certain deductions where no evidence of such was introduced.

Defendants Ross and Barshov were promoters of two limited partnerships, PAN and NAP, each of which purchased and exhibited four motion pictures during 1973-75. At that time, Congress encouraged the private sector to invest in certain types of property, including motion pictures, by granting investors/taxpayers investment tax credits and depreciation deductions based on the cost of the property.

An investment tax credit was allowed in the first year that property was placed in service, and its amount depended upon the taxpayer's first-year election of a useful life of the property. A full investment tax credit of 10% of cost was available for property having a useful life of seven or more years, two-thirds of the 10% credit was available for property with a useful life of at least five years, and one-third of the 10% credit was available for property with a useful life of at least three years. NAP's and PAN's 1973 partnership income tax returns disclosed that they elected a useful life of five or more but less than seven years. Therefore, NAP and PAN elected two-thirds of the applicable credit for all eight motion pictures.

Depreciation deductions were, as they are now, taken over a property's useful life. However, because the useful life of a motion picture could not be objectively determined as could, for example, machinery, the motion pictures of PAN and NAP were depreciated by the income forecast method of depreciation, as favored by the IRS. This legal method of depreciation for motion pictures was a fraction (the numerator of which was the income earned by a film in a given tax year, and the denominator of which was the numerator plus the *reasonably estimated* future income of that film) multiplied

against the tax, or cost, basis of a particular film to determine the depreciation deduction it generated for a given tax year.

Since this depreciation method was not determined with reference to a useful life of a fixed number of years, the IRS issued proposed regulations for determining the useful life for purposes of the investment tax credit when income forecast depreciation was used. As it applied to the instant case, the proposed regulation stated that a motion picture would be eligible for two thirds of the credit if not more than 94 per cent of the cost of the film was depreciated at the end of the third year. KOPPLE AND STIGLITZ, TAXATION OF THE MOTION PICTURE INDUSTRY 35-36 (B.N.A. 1978). The government conceded that this regulation was a "safe harbor" regulation.

The government charged ". . . that the income forecast method of depreciation was fraudulently manipulated by the defendants when they falsified the actual revenue and projected revenue." 733 F.2d at 845.

2. **Projected Revenues: Denominator**

One distributor testified that the figures used for the range in the income forecast letters prepared by him were supplied to him by either Mr. Ross, Mr. Barshov, or the partnerships' accountant. However, the distributor testified that the income forecast figures *"were within the range of acceptable forecasts."* The income forecast letters were signed by the distributor on his stationery.

Another distributor of the films testified that he provided income forecast letters for 1975 which were honest forecasts.

3. Actual Income: Numerator

The first distributor, who was contractually obligated to exhibit the pictures, testified *under a grant of immunity* that he revised two reports that originally showed no income, and put in false playdates and false income for two movies for the tax year 1975 only. He testified that either Mr. Ross or Mr. Barshov asked him to revise the income for these two movies, but he could not say which one requested the change or the words of the conversation. Thereafter, the partnerships received from the distributor two revised reports with attached subdistributor booking notices showing income, and transmitted both the original and revised reports to the accountant, to which the accountant also testified.

The Government provided two witnesses in its case-in-chief who testified that of the three alleged playdates for one movie for 1975, two of them in fact didn't play; and that of the three alleged playdates of the other movie, one of them in fact didn't play.

4. Compliance With the "Safe Harbor" Regulation

The accountant testified that in 1975, using the projections of the income forecast letters and the actual incomes as shown on the reports, the cost basis of each of PAN's four films was depreciated approximately 93.99%, and the cost basis of each of NAP's four films was depreciated 92%, 86%, 88%, and 90.24%, respectively. The accountant testified that depreciation

on all of these films in both PAN and NAP was proper and in accordance with the appropriate tax law.

5. The Prejudicial Reference to the Safe Harbor Regulation

In closing argument, the prosecutor continually argued that Mr. Barshov and Mr. Ross had manufactured the projected revenues of all eight motion pictures and the actual incomes of two pictures so as to maximize depreciation deductions without losing investment tax credits, because it was *"too extraordinary of a coincidence"* for depreciation to reach 93.99% for each PAN film.

6. The Prejudicial Reference to the IRS's Statutory Notice of Deficiency

On cross-examination of the attorney for the limited partnerships, the prosecutor questioned him about his investments in a motion picture limited partnership not the subject of the indictment, but in which Mr. Barshov and Mr. Ross were the promoters and general partners. The prosecutor elicited that the attorney received a deficiency notice from the IRS which had disallowed losses from that partnership taken on his individual income tax return, and that he had paid the deficiency.

At the finish of his closing argument, the prosecutor told the jurors:

> Now, add up the circumstances. Purpose—to create a fraud, and that is what they did. They perpetrated a fraud against the United States. That is what they conspired to do and got

> caught. *These losses have been disallowed, as Mr. Murray [the attorney] said, and the other people have said,* and now the question is, did they do it with intent to defraud? No question, they did it with intent to defraud the Government, and guilty as charged, and they filed false tax returns in conjunction with that, their own and those of the partnerships, and as well as causing third parties, their investors, to file false tax returns. Thank you.

(emphasis added).

After the prosecutor's closing argument, Mr. Ross moved for a mistrial for references to the safe harbor civil regulation and the IRS's deficiency notice. The trial court denied this motion.

7. Court of Appeals Decision

Analyzing these facts as so far set forth, the Court of Appeals stated that ". . . there was additional evidence from which [the jury] could reasonably conclude that the incriminating evidence arose not coincidentally or accidentally, but intentionally and purposefully." 733 F.2d at 846. The Court of Appeals then held that it was proper for the prosecutor to refer, in closing argument, to the depreciation taken by the partnerships in conformity with a "safe harbor" federal civil tax regulation for the purpose of inferring scienter and a "criminal design." *Id.* The Court stated that "[t]he reference was intended to serve the purpose of explaining why films were depreciated at a constant rate, and it was the consistency of depreciation . . . which was crucial." *Id.*

Despite recognizing its own rule of law that "crimes are not to be created by inferences from the combination of civil statutes and government disapproval," the Court of Appeals found no prejudice to the defendants resulting from the reference to the "safe harbor" regulation in combination with the IRS's disallowance of deductions. 733 F.2d at 846-47. *See United States v. Frade*, 709 F.2d 1397, 1392 (11th Cir. 1983) (enunciates the above rule of law).

REASONS FOR GRANTING CERTIORARI

THIS CASE PRESENTS A SPECIAL AND IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

Petitioner submits that the prosecutor's reference to the "safe harbor" regulation was, by itself, prejudicial and denied him a fair trial because the "safe harbor" civil tax regulation, by its nature, required the defendant, under threat of civil penalty, to depreciate the films in the very manner of consistency from which a "criminal design" was inferred.

To state, as the prosecutor did, that 93.99% depreciation on all four of PAN's films was "just too extraordinary to be coincidence" belies the nature of the "safe harbor" regulation. The fact of the matter was, as the government's own evidence proved, that these income forecast depreciation deductions were not supposed to be coincidental, but were supposed to be tailored purposefully by the taxpayer not to exceed 94% in accordance with the civil regulation, *so long as the subjective estimates of future income were reasonable.*

The real factual questions which the jury had to resolve were whether the defendants knew actual income was falsified, and whether they knew the projected income was unreasonable. The government's reference to what the defendant's had done purposefully, yet in accordance with the safe harbor regulation, as being "too extraordinary to be coincidence," misled the jury and caused them to transfer the defendants' intent to comply with the "safe harbor" regulation into an intent to defraud the government by "criminal design." Indeed, that regulation was a congressionally and administratively implemented "design" to force depreciation of films in a consistent manner. The petitioners were required, under threat of losing portions of investment tax credits, to "pattern" *all* the films' depreciation deductions after the "safe harbor" regulation, so long as each depreciation deduction was based upon an estimate of future earnings that was within a reasonable range.

This reference to the "safe harbor" regulation when combined with the argument that the IRS had disallowed the deductions of PAN and NAP, especially when the evidence of deficiency notices related to other partnerships, caused the jury to be further prejudiced against the defendants because the prosecutor implied that the IRS had also decided that there was a "criminal design."

The petitioner submits that, in order to receive a fair trial and due process of law, the jury must consider the relevant factual issues without the confusion and prejudice created by the misleading reference to the safe harbor civil regulation and the IRS notice of deficiency. This is especially so because there was strong evidence to support the defendants' hypotheses that:

(1) The distributor, who was an the immunized witness, falsified the 1975 income of the two films without the defendants' knowledge; and

(2) The projected revenues of the films for purposes of income forecasting were reasonable and not willfully misstated.

Petitioner submits that due process restrains the government from forcing the defendants to depreciate films in a consistent manner under civil regulations and the threat of civil sanctions, and then referring to that manner of depreciation as "too extraordinary to be coincidence" to prove that the defendants perpetrated a "criminal design."

Petitioner submits that the Court of Appeals opinion below which lets this rule of law stand has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by the lower court, as to call for the exercise of this Court's power of supervision, especially where the issues involved reach constitutional due process dimensions.

CONCLUSION

For that special and important reason Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed on behalf of James E. Ross and Emanuel Barshov has been mailed to: MICHAEL L. PAUP, ESQUIRE and DEBRA DAWSON, ESQUIRE, Appellate Section, Tax Division, United States Department of Justice, Washington, DC 20530; and one copy was mailed to SOLICITOR GENERAL, Department of Justice, Washington, DC 20530, this 11 day of September, 1984.

Nathan D. Clark

NATHAN D. CLARK, ESQUIRE

Appendix

APPENDIX A

* * *

UNITED STATES of America,
Plaintiff-Appellee,

v.

Emanuel BARSHOV and James E. Ross,
Defendants-Appellants.

No. 83-5158.

United States Court of Appeals, Eleventh Circuit.

June 4, 1984.

Defendants were convicted in the United States District Court for the Southern District of Florida, James C. Paine, J., of conspiracy to violate and violation of tax laws of United States, and defendants appealed. The Court of Appeals, Albert J. Henderson, Circuit Judge, held that: (1) evidence was sufficient to support convictions; (2) prosecution's reference to 94% limitation on accumulative depreciation deduction allowable for limited partnership in which defendants were general partners did not deny defendants fair trial; (3) cross-examination of defendants with respect to their income from partnerships and amount of their tax liability did not deny defendants fair trial; (4) District Court was not required to make in camera inspection of Government's witness' tax return before ruling on *Brady* motion for exculpatory material involving witness' tax

liability; (5) trial court did not abuse its discretion in denying motion to examine jury with respect to prejudicial remark allegedly made during jury selection; and (6) District Court was not required to make further inquiries on issue of whether extraneous, prejudicial information was improperly brought to jury's attention during trial.

Affirmed.

1. **Criminal Law—1144.13(3, 5)**

In reviewing sufficiency of evidence to support conviction, evidence presented and inferences that may be drawn therefrom must be viewed on appeal in light most favorable to government.

2. **Conspiracy—47(9)**
Internal Revenue—5303

Evidence in prosecution for conspiracy to violate and violation of tax laws of United States, including evidence that defendants inflated purchase price of films and income therefrom in order to maximize depreciation costs and investment credit of limited partnerships of which they were general partners, was sufficient to support conviction. 18 U.S.C.A. §371; 26 U.S.C.A. §7206(1, 2).

3. **Criminal Law—713**

Where prosecutor's reference, in closing argument, to 94% depreciation rate, came as Government quoted opinion letter utilized by defendants in furtherance of their enterprise, reference was intended to serve purpose of explaining why films were depreciated at constant

rate, and it was consistency of depreciation, not rate, which was crucial to Government's case that defendants conspired to violate and violated tax laws by inflating purchase price of films and income therefrom in order to maximize depreciation costs and investment credits of limited partnerships of which they were general partners, error in stating percentage rate did not deprive defendants of fair trial.

4. Criminal Law—713

Where evidence was sufficient to establish necessary scienter on part of defendants charged with violation of and conspiracy to violate tax laws, prosecution's mention of depreciation limitation and disallowance by Internal Revenue Service of losses claimed by limited partnerships of which defendants were general partners did not deprive defendants of fair trial. 18 U.S.C.A. §371; 26 U.S.C.A. §7206(1, 2).

5. Criminal Law—706(4)

Prosecutor's cross-examination of defendants with respect to their income from limited partnerships of which they were general partners and amount of their tax liability was directly relevant to offenses of conspiracy to violate and violation of tax laws in that it established motive and rebutted one aspect of their defense; thus, such cross-examination did not constitute prosecutorial misconduct which deprived them of fair trial. 18 U.S.C.A. §371; 26 U.S.C.A. §7206(1, 2).

6. Criminal Law—720(7)

Prosecutor's reference, in closing argument in tax fraud case, to testimony that certain deductions had been disallowed was not improper on theory that the reference implied that the Internal Revenue Service had already decided what the jury was being asked to determine, that is, whether, defendants had intended to defraud the Government.

7. Criminal Law—719(1), 1171.3

Reference, in prosecutor's closing argument in tax fraud case, to what "other people" in addition to specified witness had said with respect to disallowance of claimed deductions was improper, where there was no evidence to substantiate it, but the statement was harmless where there was testimony from named witness to support the essential thrust of the prosecutor's claim, and error was cured by district court's instructions that jurors must consider only the evidence in the case and that lawyers' statements and arguments were not evidence.

8. Criminal Law—627.6(1)

To establish violation of defendant's right to exculpatory material, defendant must prove prosecution's suppression of evidence, favorable character of suppressed evidence for defense, and materiality of suppressed evidence.

9. Criminal Law—627.8(4)

Where defendant merely suggested possibility of existence of information he hoped to uncover concerning tax liability of witness who testified for Government in prosecution for conspiracy to violate and violation of tax laws, district court was not required to make in camera inspection of witness' tax return information before ruling on defendant's *Brady* motion for exculpatory material.

10. Criminal Law—627.8(4)

Where there was ample evidence from which jury could infer Government's witness' criminal conduct, as well as his compelling selfish interest in testifying for Government in prosecution for conspiracy to violate and violation of tax laws, so that information relating to witness' taxes would not have affected outcome of trial, district court was not required to make in camera inspection of witness' tax return information before ruling on defendant's *Brady* motion for exculpatory material in reference to tax information about witness. 18 U.S.C.A. §371; 26 U.S.C.A. §7206(1, 2).

11. Conspiracy—41

Conspirator is charged with acts of his coconspirators, if such acts were done in furtherance of conspiracy.

12. Criminal Law—423(3)

Where defendants were indicted on charges of conspiracy to violate tax laws, witness' testimony that one of defendants asked him to falsify certain reports

was admissible as evidence of act performed in furtherance of conspiracy, even though witness could not remember which defendant had made request. 18 U.S.C.A. §371; 26 U.S.C.A. §7206(1, 2).

13. Criminal Law—427(3)

Where there was no motion made for hearing to determine whether substantial independent evidence showed conspiracy between defendant and declarant of challenged statement, trial court did not err in failing to make explicit determination prior to admission of statement, of existence of conspiracy to violate tax laws. 18 U.S.C.A. §371; 26 U.S.C.A. §7206(1, 2).

14. Jury—131(4)

Trial court did not abuse its discretion in denying motion to examine jury panel with respect to prejudicial remark allegedly made by prospective juror, where court agreed to investigate matter during recess, attorney in another case reported remark of one prospective juror that one defendant looked like a crook, another person verified attorney's account, neither witness could positively identify speaker, and court's refusal to conduct inquiry as to who had made remark and see if remark had been heard and had effect on other jurors was based on court's determination that inquiry might aggravate situation.

15. Criminal Law—868

Where colorable showing of extrinsic influence on jury is made, trial court, in exercise of its discretion, must make sufficient inquiries or conduct hearing to

determine whether influence was prejudicial; however, there is no per se rule requiring inquiry in every instance.

16. Criminal Law—868

Duty to investigate arises only when party alleging jury misconduct makes adequate showing of extrinsic influence to overcome presumption of jury impartiality; in other words, there must be something more than mere speculation.

17. Criminal Law—868

Although juror's son attended trial every day, was seen talking to jurors during recesses and eating lunch with his mother and other jurors, had talked to prosecutor and defense counsel about case, and had attempted to discuss case with one defendant, in absence of colorable showing that son of juror discussed case with jurors and that jurors failed to follow court's instructions not to discuss case with anyone, district court was not required to make further inquiries or to conduct hearing to determine whether extraneous, prejudicial information or outside influence was improperly brought to jury's attention. 18 U.S.C.A. §371; U.S.C.A. §7206(1, 2).

18. Criminal Law—865(1)

Where there was no indication that verdicts could and would not be reached, instructions stressed that jury would have as much time as necessary to reach verdicts, and that it was not restricted by arbitrary deadline, dialogue between court and jurors concerning possibility of weekend deliberations, together with court's

supplemental instructions, did not have effect of hurrying and coercing jurors into reaching verdict.

* * *

Michael Tarre, Coral Gables, Fla., for Barshov.

Culverhouse, Botts, Mills & Cone, Hugh F. Culverhouse, Jr., Nathan D. Clark, Miami, Fla., for Ross.

Glenn L. Archer, Michael L. Paup, Chief Appellate Sec., Deborah Dawson, Robert E. Lindsay, Tax Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

ALBERT J. HENDERSON, Circuit Judge:

Emanuel Barshov and James E. Ross were convicted in the United States District Court for the Southern District of Florida on one count of conspiracy and twenty-three substantive counts for violations of the tax laws of the United States.[1]

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[1]Count I charges Barshov and Ross with conspiracy to impede, disrupt and defeat the Internal Revenue Service in the computation and collection of tax revenue. 18 U.S.C. 371.

In Counts II and III Ross alone is accused of making individual tax returns (Forms 1040) for 1974 and 1975 which were not true and correct. 26 U.S.C. 7206(1).

PAN Properties, Ltd. ("PAN") and NAP Properties, Ltd. ("NAP") were limited partnerships formed in 1973 under the laws of Florida by Barshov and Ross, who were the general partners. Both PAN and NAP attracted a number of limited partners, each of whom was an investor in the partnerships.[2] The stated purpose of these limited partnerships was to buy motion pictures for distribution and exhibition. To that end, PAN and NAP each bought four movies and, of the total purchase price, paid a small percentage in cash and secured the remainder with "non-recourse" promissory notes.[3]

(Footnote 1 Continued)

Counts IV and V charge Barshov with similar offenses for 1974 and 1975. 26 U.S.C. 7206(1).

In Counts VI and IX Ross is indicted for making false partnership returns (Form 1065) for 1974 on behalf of two partnerships. 26 U.S.C. 7206(1).

Counts VII and X allege that Barshov willfully aided and assisted in the preparation of the same false partnership returns for 1974. 26 U.S.C. 7206(2).

Counts VIII and XI accuse Barshov and Ross of wilfully making false partnership returns for 1975. 26 U.S.C. 7206(1).

In Counts XII through XXIV Barshov and Ross are charged with aiding and assisting in the preparation of thirteen false individual tax returns filed by others. 26 U.S.C. 7206(2).

[2]A limited partner's liability is limited to the amount of his investment, while a general partner's liability is unrestricted.

[3]The indictment alleged that during 1973 and 1974, Barshov and Ross, on behalf of PAN, made payments totalling approximately $290,000.00 and executed promissory notes without personal recourse

The criminal charges stem from the manner in which the financial arrangements for these purchases were subsequently reported to the Internal Revenue Service ("IRS"). Each partnership, and hence each partner, was entitled to certain depreciation deductions and investment tax credits in conjunction with the movie purchases. Such deductions and credits are determined by the basis, or cost, of each movie, and the ratio of its actual revenue in any one year over its projected lifetime revenue. The government claims that Barshov and Ross knowingly purchased the movies at tremendously inflated prices and, therefore, knowingly raised the basis for depreciation and investment credit purposes. Additionally, the government charges that the income forecast method of depreciation[4] was fraudulently manipulated by the defendants when they falsified the actual revenue and projected revenue. The basis for the indictment is the fact that deduction and tax credits were arrived at by fraud and were reflected on the partnership returns for PAN and NAP, the individual returns for Barshov

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(Footnote 3 Continued)

(non-recourse) to the seller in the sum of $2,600,000.00. During that same period they made payments totalling approximately $289,000.00 and executed non-recourse notes in the sum of $2,250,000.00 for NAP.

[4]The income forecast method of depreciation is computed by multiplying the tax basis by a fraction, the numerator of which is the income earned by a film for the tax year and the denominator of which is the numerator figure plus the reasonable estimated future income to be earned by the film for its life expectancy. If a film does not produce any income for a given year, the numerator of the fraction would be zero, and no depreciation could be claimed for that year.

and Ross, and the individual returns of the limited partners.

On appeal, Barshov and Ross allege that (1) the evidence was not sufficient to support the jury's verdicts, (2) prosecutorial misconduct deprived them of a fair trial, (3) the district court erred in its disposition of pretrial motions, (4) certain testimony was improperly admitted, (5) the district court failed to conduct an evidentiary hearing into allegations of jury misconduct, (6) the district court's supplemental instructions to the jury were coercive, and (7) the cumulative effect of these alleged errors compels a new trial. We have examined these assignments of error after a thorough review of the record and applicable law and, finding no deficiencies resulting in prejudice to the appellants, we affirm the convictions.

I.

During the trial, the defendants moved for judgments of acquittal, claiming that their "hypothesis of innocence" was sufficiently strong and reasonable to create a reasonable doubt as to their guilt. They contend that the evidence supported their theory of defense to a greater extent than it did the government's inference of guilt.

[1] The proper standard of review for sufficiency of evidence was articulated in *United States v. Bell*, 678 F.2d 547 (5th Cir.1982) (*en banc*), *aff'd* ____ U.S. ____, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983):

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or

> be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

678 F.2d at 549.[5] The evidence presented and the inferences that may be drawn therefrom must be viewed on appeal in the light most favorable to the government. *Id., citing Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942).

[2] Adhering to these guidelines, we conclude that the evidence presented by the government was sufficient to support the jury verdict. The thrust of the government's proof was the criminal design to inflate the purchase price of the films and the income therefrom in order to maximize the depreciation costs and the investment credit. Although the appellants offer several innocent "explanations" to rebut the evidence, none of them are so persuasive that they could not have reasonably been rejected by the jury. Simply stated, the jury was confronted with evidence which clearly established a pattern of guilt, and there was additional evidence from which they could reasonably conclude that the incriminating evidence arose not coincidentally or accidentally, but intentionally and purposefully. Taking the evidence as a whole, it was more than enough to sustain the verdicts of guilt.

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (*en banc*), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

II.

Barshov and Ross call attention to three instances of alleged prosecutorial misconduct which they claim deprived them of a fair trial. They first complain that the prosecutor, in closing argument, referred to a 94 percent depreciation limitation on the accumulated depreciation deduction allowable for PAN. They say that the 94 percent figure was incorrect, and that any reference to civil regulations relating to depreciation was improper in drawing inferences of criminal conduct.

[3] In the context in which the 94 percent figure was mentioned, it makes no difference whether the proper statutory limit was 94 percent or 96 percent as contended by Barshov and Ross. Reference to the 94 percent figure came as the government quoted an opinion letter utilized by the appellants in the furtherance of their enterprise. The reference was intended to serve the purpose of explaining why films were depreciated at a constant rate, and it was the consistency of depreciation, not the rate figure, which was crucial. Thus, any error in the percentage rate was of no consequence.

[4] In asserting the impropriety of arguing the violation of civil regulations to impute criminal conduct, Ross cites *United States v. Frade*, 709 F.2d 1387, 1392 (11th Cir.1983), in which the court held that "crimes are not to be created by inferences from the combination of civil statutes and government disapproval." He says that the mention of the depreciation limitation created prejudicial inferences when combined with the statement of the prosecutor that partnership losses had been disallowed by the IRS.

If the evidence had been confined to that cited in these statements, it would not have been sufficient to sustain a finding of guilt because the statutes also require proof of intent to defraud. However, this is not a case in which the government attempted to prove a crime simply by proving a violation of civil law or regulations. There was ample evidence of the appellants' conduct to establish the necessary scienter.[6]

[5] The appellants also fault the government attorney's cross-examination of them with respect to their income from the partnerships and the amount of their tax liability. This evidence was directly relevant to the offenses charged to establish motive and to rebut one aspect of their defense. Evidence of the appellants' considerable income from the partnerships and their use of partnership "losses" to eliminate their tax liability goes to the motive of establishing tax-free profits and was directly connected to the alleged conspiracy. The cross-examination was also necessary to rebut their defense that they wanted the partnerships' films to be successful.

[6,7] The third claim of prosecutorial misconduct stems from a comment made by the prosecutor in his closing argument respecting the testimony of the partnerships' attorney, Oliver Murray, that certain deductions he had made on his tax return in connection with another limited partnership had been disallowed by the IRS. In summation, the prosecutor said:

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[6]Moreover, the prosecutor explicitly stated that the issue of guilt was for the jury to determine: "[N]ow the question is, did they do it with intent to defraud?"

> Now, add up the circumstances. Purpose—to create a fraud, and that is what they did. They perpetrated a fraud against the United States. That is what they conspired to do and got caught.
>
> *These losses have been disallowed, as Mr. Murray said, and the other people have said, and now the question is did they do it with intent to defraud?* [Emphasis added.]

The appellants argue that the reference to the disallowed deductions implied that the IRS had already decided what the jury itself was being asked to determine—that is, whether the appellants intended to defraud the government.

There was no error in referring to Murray's testimony. However, the reference to what "other people" had said was improper, because there was no evidence to substantiate it. The essential question, then, is whether this statement was harmless.

Examining the remark in the context of the entire record, we do not find that any substantial prejudice accrued to the appellants. First, there was evidence—Murray's testimony—to support the essential thrust of the prosecutor's claim. Second, the error was cured by the district court's instructions to the jurors that they must consider only the evidence in the case, and that the lawyers' statements and arguments were not evidence. Hence, any error was harmless.

III.

Before the trial began, the appellants sought access to the 1973, 1974 and 1975 tax returns of Samuel Lang, a key witness for the government under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 10 L.Ed.2d 215 (1963). On May 20, 1982, the magistrate ordered the government to disclose to the appellants the relevant portions of Lang's individual tax returns for the tax years in issue, as well as any agreements between the government and Lang regarding his tax returns or possible prosecution.[7]

The government responded that it had no such materials and information. However, on June 14, 1982, the government disclosed to defense counsel that Lang had not filed income tax returns since 1972. The

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[7]The order specified that:

> (I)n the event that the Government intends to call Samuel Lang as a witness, the Government disclose to the defendant pursuant to Title 26, U.S.Code, Section 6103(h)(4).
>
> 1. Those portions of the individual tax returns of Samuel Lang for the taxable year 1973 through and including 1975 which refer or pertain to PAN LTD and/or any other business enterprise, venture or tax shelter as to which the defendant Ross is charged herein; [citations omitted].
>
> 2. Any and all agreements, promises, rewards, understandings, settlements and/or understandings between the Government and Samuel Lang pertaining to the processing, examination and/or credits, allowances or liability, civil and/or criminal, of Samuel Lang as to any income tax collections, obligations, approvals, penalties, fines, forfeitures, interest charges and/or prosecutions; [citations omitted].

government also gave defense counsel transcripts of an audit of Lang's tax liability for 1972 through 1974.

On September 3, 1982, Ross filed a motion to dismiss, alleging that the government had intentionally suppressed critical impeachment evidence in not revealing Lang's failure to file returns for ten years. In the alternative, Ross asked that the court fashion a procedure so that he would be assured of receiving tax "return information" about Lang, which included a request that the court inspect *in camera* all available tax "return information" in order to insure the government's compliance with the court's *Brady* orders.

A hearing on Ross's motion was held before the magistrate on September 21, 1982. The magistrate determined that the government had not withheld any *Brady* material but did order that:

> The Government forthwith shall furnish disclosure to the defendants (unless heretofore done so) any and all oral or written agreements, commitments, promises and/or understandings it has with Samuel Lang . . . as to any benefits and/or advantages or disadvantages to (him) of whatsoever kind or nature.

The government again stated that it had no such information pertaining to Lang. On September 29, 1983, the district court denied the defendants' pending *Brady* motions.

Seizing on this sequence of events, Ross says that the district court erred in failing to make an *in camera*

inspection of Lang's tax return information before ruling on the last *Brady* motion. We disagree.

[8] In *Brady*, the Supreme Court set forth the general rule for evaluating the due process implications of a prosecutor's refusal to provide favorable evidence to the defense: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218. Subsequent decisions have refined and clarified this decision. To establish a *Brady* violation the defendant must prove (1) the prosecution's suppression of evidence; (2) the favorable character of the suppressed evidence for the defense; and (3) the materiality of the suppressed evidence. *United States v. Sink*, 586 F.2d 1041, 1051 (5th Cir.1978); *United States v. Anderson*, 574 F.2d 1347, 1353 (5th Cir.1978).

[9] The record before us does not substantiate the allegation that the government suppressed existing evidence. There is no evidence of the existence of further tax information. Ross merely suggests the possibility of the existence of the information he hoped to uncover. Such speculative allegations do not adequately invoke the rule.[8]

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[8]Appellants rely on *United States v. Diaz-Munoz*, 623 F.2d 1330 (5th Cir.1980), for the proposition that the district court had a duty to inspect hypothetical "evidence" in order to verify the government's assertions that such evidence did not exist. *Diaz-Munoz* does not support such a general proposition. The error addressed in *Diaz-Munoz* was the district court's reliance on government representations about the relevance of documents

[10] Moreover, there is no showing of the materiality of any possible suppressed evidence. *Brady* mandates reversal only where, upon examination of the entire record, it appears that "the omitted evidence creates a reasonable doubt that did not otherwise exist." *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342, 355 (1976). Accord, *United States v. Diaz-Munoz*, 632 F.2d 1330, 1334 (5th Cir.1980). The information relating to Lang's taxes would not have affected the outcome of the trial. There was ample evidence from which the jury could infer Lang's criminal conduct, as well as his compelling selfish interest in testifying for the government. These concessions were adequately developed from the defendants' cross-examination of Lang about his failure to file his tax returns. *See Keating v. Missouri*, 643 F.2d 1315, 1319-20 (8th Cir.), *cert. denied*, 454 U.S. 846, 102 S.Ct. 163, 70 L.Ed.2d 133 (1981) (evidence of an agreement between prosecution and witness not material under *Brady* where defense cross-examination sufficiently called into question witness' credibility).

IV.

Clayton Pantages, the distributor of "Made", a NAP movie, and "Straight On", a PAN film, testified that reports he prepared for the purpose of making his

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(Footnote 8 Continued)

which the government admitted to having in its possession, and the court's failure to evaluate the evidence for itself. That case is critically distinguishable from the instant situation, in which the government consistently contended that it had no evidence that established whether or not Lang had an obligation to file tax returns, and that it had no agreement with Lang which might have influenced his testimony.

income forecasts on those films revealed that they generated no income in 1975. He testified, over Ross's objection, that after the completion of the reports, either Ross or Barshov asked him to revise the income for these two movies, and that he subsequently changed the reports, inserting false play dates and false income.[9] Pantages testified that he could not recall which of the defendants called him and made the request.

It is this inability to remember which of the two defendants made the request that forms the basis of Ross's argument that the testimony was inadmissible. Ross relies on *DeLoach v. United States*, 307 F.2d 653, 654-55 (D.C.Cir.1962), in which the trial court erred in admitting certain statements made by an unidentified speaker who was one of several co-defendants for the purpose of binding a single defendant.

[11] The government points out there was no conspiracy charged in *DeLoach* and consequently, there was no element of vicarious liability. In contrast, Barshov and Ross were indicted and convicted on conspiracy charges. A conspirator is charged with the acts of his co-conspirators, if such acts were done in furtherance of the conspiracy. *See, e.g., Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S.CT. 1180, 1184, 90 L.Ed. 1489, 1496 (1946). For this reason, the government asserts that it does not matter whether it was Barshov or Ross who asked Pantages to falsify play dates, so long as it was one of the two.

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[9]The income figures were important components of the depreciation computations. See n. 4 *supra*.

[12] We agree that *DeLoach* is distinguishable from the present case, and that Pantages' testimony was admissible as evidence of an act performed in furtherance of a conspiracy.[10]

[13] Ross submits that even if the government is correct, the district court still erred in admitting the statement because at the time of Pantages' testimony there was no sufficient evidence to establish the conspiracy. He claims that it is error to admit such statements until the government first proves the existence of the conspiracy and the defendant's participation in it beyond a reasonable doubt.

In *United States v. James*, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), the former Fifth Circuit Court of Appeals established the "preferred order of proof" for the admission of co-conspirator statements. Under the *James* standards, the initial admissibility of co-conspirator statements depends upon whether the government can produce substantial independent evidence showing that a conspiracy existed between the defendant and the declarant, and that the statements were made during the course of and in furtherance of the conspiracy. *Id.* at 581. Because the district court "normally" should make this threshold determination before the jury hears the challenged statements, *id.*, the procedure by which the district court makes this determination has come to be known as a "*James* hearing."

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[10]Fed.R.Evid. 801(d)(2)(E) provides that a statement is not excludable as hearsay if offered against a party and made "by a co-conspirator of a party during the course of and in furtherance of the conspiracy."

The *James* court also stated that if the district court concludes that a *James* hearing is not reasonably practical, it can admit the statements subject to the government later "connecting them up" with sufficient independent evidences. *Id.* at 582. In either situation, on appropriate motion, the district court must determine that, by a preponderance of the independent evidence, there was a conspiracy between the defendant and the declarant and the statements were made during and in furtherance of the conspiracy. *Id.*

In the trial of this case, there was no motion made for a *James* hearing when Pantages testified, nor was there a motion at the conclusion of all the evidence. In the absence of such motions, we cannot find error in the failure of the district court to make an explicit determination of the existence of the conspiracy.

There is no contention that, at the conclusion of the case, the evidence did not preponderate in favor of the existence of a conspiracy. In fact, no such assertion could creditably be made because, even excluding Pantages' challenged testimony, there was sufficient evidence to support the finding of a conspiracy. The district court did not err in admitting the evidence.

V.

[14] Barshov next claims that the trial court committed reversible error by denying a defense motion to examine the jury panel with respect to a prejudicial remark allegedly made during jury selection.

Jury selection for this case was conducted simultaneously with the choosing of panels for two

other trials. During the selection process, the prospective jurors gave short recitals of pertinent facts about themselves. The court then introduced the parties and attorneys involved in the three cases, and asked if any of the prospective jurors were related to or acquainted with them in any way. At that point, Barshov's counsel approached the bench and told the judge that counsel in one of the other cases had informed him that when Barshov had stood up one of the prospective jurors stated, "He looks like a crook." The court agreed to investigate the matter during a recess.

After the court, the government attorney and defense counsel had questioned the prospective jurors individually on a number of matters relevant to their qualifications, the jurors were excused and the trial judge inquired into the circumstances surrounding the comment. The lawyer who had overheard the remark repeated it to the court and another person verified the attorney's account, adding that the remark had been accompanied by a "short laugh." Neither witness could positively identify the speaker, but it was believed that the remark had been made by a prospective juror who had made other offhand comments.

Defense counsel requested the court to determine who, in fact, made the remark, and also asked that the entire jury panel be examined to see if the remark had been heard and had had any effect on their ability to sit on the case. The court refused to conduct such an inquiry, stating that he would not assume taint from the remark and that an inquiry might "aggravate the situation." The suspected prospective juror was ultimately excused by Barshov.

We have repeatedly held that the district court is vested with broad discretion in deciding whether to interrogate jurors regarding alleged misconduct. *United States v. Williams*, 716 F.2d 864, 865 (11th Cir.1983); *United States v. Chiantese*, 582 F.2d 974, 978-80 (5th Cir.1978), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979). After examining the statements of counsel and the court during the hearing outside the presence of the jurors, we conclude that the trial judge acted within his discretion in declining to make further inquiry in this case.

In *Chiantese*, 582 F.2d at 980, we set out the factors which must be considered by the district court:

> In determining whether to conduct a hearing in a case such as this, the court must balance the probable harm resulting from the emphasis such action would place upon the misconduct and the disruption involved in conducting a hearing against the likely extent and gravity of the prejudice generated by the misconduct.

The district court's disposition of Barshov's motion was well within these parameters of discretion. The court properly made an inquiry during the recess to determine the nature of the alleged misconduct. The court then gave full consideration to the possible effect of the remark on the panel, as well as to the aggravating effect that might result from an examination. The district court is in the best position to make the necessary determinations. Having clothed the court with broad discretion, we will not now attempt to second-guess the evaluation and ultimate holding.

VI.

The appellants next urge that the district court erred in denying their post-trial motion to interview the jurors who served in the case and the son of juror Phillips because of their suspicion that "extraneous, prejudicial information or outside influence was improperly brought to the jury's attention during trial." They also claim that the court erred in denying Barshov's motion for new trial which alleged that "the jury's verdict may have been affected by extraneous prejudicial information and outside influence from one of the juror's sons."

Simultaneous with the filing of their motion, the appellants submitted affidavits stating that juror Phillips' son had attended the trial every day and overheard discussions occurring outside of the jury's presence; that he was seen talking to jurors during recesses and eating lunch with his mother and other jurors; that he talked to the prosecutor and defense counsel about the case; that he attempted to discuss the case with Barshov; that, when the jury began deliberations, he gave Ross an envelope containing his "decision" in the case; that he told Barshov's wife that people like the Tylenol killers "should be shot"; that, after the jury returned its verdict, he told Barshov's attorney that "we did as well as we could with what we had", and that his mother had trouble hearing some of the testimony and some of counsel's questions.

Barshov argues that the trial court has a duty to investigate when potential conduct which might have influenced the jury's deliberations is brought to its

attention, and the failure to conduct a hearing is an abuse of discretion.

[15, 16] Where a colorable showing of extrinsic influence is made, a trial court, in the exercise of its discretion, must make sufficient inquiries or conduct a hearing to determine whether the influence was prejudicial. *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir.), *cert. denied*, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979). However, there is no *per se* rule requiring an inquiry in every instance. *United States v. Martinez*, 604 F.2d 361, 364 (5th Cir.1979), *cert. denied*, 444 U.S. 1034, 100 S.Ct. 708, 6 L.Ed.2d 671 (1980). The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality. *Winkle*, 587 F.2d at 714. In other words, there must be something more than mere speculation. *United States v. Sedigh*, 658 F.2d 1010, 1014 (5th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1279, 71 L.Ed.2d 462 (1982). We agree with the district court that the appellants made no such colorable showing.

[17] The appellants' affidavits contain no evidence that the jurors and the son of juror Phillips engaged in any improper discussions. As the district court stated in addressing the appellants' contention:

> The fact that jurors were seen in conversation with a spectator over lunch does not give rise to the presumption that they were discussing the case. It is presumed that the jurors followed the court's oft-repeated instructions not to discuss the case with anyone. *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304 (5th Cir.1977). There is

> nothing in the affidavits attached to the Defendants' motion which indicates the "improper conveyance of information to the jury." *Id.* at 1310. All parties and the court were aware of Mr. Phillips' presence through the trial and no objection was presented to the court at that time. Further "[t]he trial judge instructed the jury not to discuss or allow anyone else to discuss the case with them. We cannot presume, without an affirmative showing, that the jury failed to follow these instructions. *Id.* at 1310.

Although the pattern of behavior attributed to the juror Phillips' son may be characterized as unusual and peculiar, that in itself does not suffice to mandate further inquiry. In the absence of a colorable showing that the conduct complained of impugned in any way the integrity of the trial process, the district court was not required to make further inquiries or to conduct a hearing, and its refusal to do so did not constitute an abuse of discretion.

VII.

[18] The appellants assert that the court's supplemental instructions had the effect of hurrying and coercing the jurors into reaching a verdict. They recite selective portions from the dialogue between the court and the jury concerning the possibility of weekend deliberations to support their charge that the jurors were led to believe they would have to reach a verdict before the weekend.

In determining whether the district court's supplemental instructions were coercive in this instance,

we consider not only the specific instructions, but also the "totality of the circumstances." *Jenkins v. United States*, 380 U.S. 445, 446, 85 S.Ct. 1059, 1060, 13 L.Ed.2d 957, 958 (1965).[11]

We have reviewed both the language of the instructions and the dialogue which ensued and find no indicia of coercion. First, there is no indication that verdicts could and would not be reached. *United States v. Blevinal*, 607 F.2d 1124, 1127 (5th Cir. 1079), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1315, 63 L.Ed.2d 761 (1980). Second, the instructions stressed that the jury could have as much time as necessary to reach its verdicts, and that it was not restricted by an arbitrary deadline. *See id.* at 1127. Taken as a whole, the district court's instructions "carefully avoided the pitfalls of coercive deadlines, threats of marathon deliberations, pressure for surrender of conscientiously held minority views, or any implication of a false duty to decide." *United States v. Cheramie*, 520 F.2d 325, 331 (5th Cir.1975).

VIII.

The appellants finally argue that the cumulative effect of all the "errors and near-errors" during the trial requires reversal of the convictions. Without harmful errors, there can be no cumulative effect compelling reversal.

The judgments of the district court are AFFIRMED.

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[11]Although the "totality of the circumstances" test was fashioned to evaluate the effects of *Allen* charges, it may be used wherever "it is alleged that a supplemental charge coerced the jury in its decision making." *United States v. Cheramie*, 520 F.2d 325, 328 (5th Cir.1975).

APPENDIX B

KOPPLE AND STIGLITZ,
TAXATION OF THE MOTION PICTURE INDUSTRY
35-36 (B.N.A. 1978)

* * *

9. Useful life required for credit.

Prior to the Revenue Act of 1971 a full investment tax credit of 7 percent only was available with respect to tangible personal property with a useful life of eight or more years, two thirds of the 7-percent was available for property with at least a six-year useful life, and one third of the 7-percent credit was available for property with at least a four-year useful life.[60] After enactment of the Revenue Act of 1971, but before enactment of the Tax Reform Act of 1976, a full investment tax credit of 10 percent was available for property having a useful life of seven or more years, two thirds of the 10 percent credit was available for property with a useful

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[60]I.R.C. §46 (c)(2), prior to amendment by Revenue Act of 1971 (P.L. 92-178), Section 102(a)(1). The investment tax credit was terminated by the addition of I.R.C. §49, which provided that "Section 38 property" did not include property constructed or acquired after April 18, 1969, and the investment tax credit was reinstated by the addition of I.R.C. §50, added §101(a) of by the Revenue Act of 1971 (P.L. 92-178), for property the construction of which was completed after August 15, 1971, or begun after March 31, 1971, and for property which was acquired after August 15, 1971, or prior to that date but after March 31, 1971, pursuant to an order placed after March 31, 1971.

life of at least five years, and one third of the 10 percent credit was available for property with a useful life of at least three years.[61]

Under the Revenue Act of 1971, the useful life of a film for puposes of the investment tax credit had to be the same as the useful life utilized to compute depreciation.[62] When a taxpayer depreciated a film over a fixed number of years, he had to use the same period of years in computing the investment tax credit.

However, depreciation computed on the income forecast method was not determined with reference to a fixed number of years, and hence there was no fixed number of years designated for computing the applicable percentage of the investment tax credit that is available. Accordingly, the Committee Reports relating to the reenactment of the investment tax credit set forth rules for determining the percentage of the investment tax credit available where a film was depreciated on the income forecast method.[63] These Committee Reports provide:

> " . . . that where a taxpayer uses a method of depreciation, such as the units-of-production method or the income-forecast method, which does not directly relate the useful life of the property in

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[61]I.R.C. §46(c)(2).

[62]I.R.C. §46(c)(2), last sentence.

[63]H. Rept. No. 92-708, 92d Cong., 1st Sess. 34 (1971).

terms of a specific number of years, the determination as to what constitutes the useful life for purposes of the investment credit as required by the bill should be made by comparing the depreciation taken under the units-of-production method or income-forecast method at the end of 3, 5, and 7 years with the most liberal depreciation which would be taken under the double-declining-balance or sum-of-the-years digits method for an asset of the useful life of 7 years. If the depreciation expected to be taken under the units-of-production method or income forecast method at these time intervals does not exceed by more than 20 percent the depreciation taken under the most favorable of the other two methods, the useful life of the asset under the income-forecast method or units-of-production method will be assumed to be 7 years."

It was commonly believed that the effect of applying these rules was that a motion picture depreciated on the income forecast method would be eligible for (a) the full investment tax credit, provided that no more than about 77 percent of the cost of the film was depreciated by the end of the third year following the date on which the film is "placed in service"; (b) two thirds of the credit if more than 77 percent but less than 96 percent of the cost of the film was depreciated by the end of the third year; and (c) one third of the credit for any film on which a great percentage of the cost was depreciated.

Withdrawn Proposed Treas. Reg. §1.46-3(e)(7)(iv)(b) imposed a more stringent test than the Committee Reports for determining useful life for purposes of the investment tax credit when income forecast depreciation

was used. These Proposed Regulations provided that (1) a motion picture will be eligible for the full credit only if no more than 77 percent of the cost of the film is depreciated by the end of the third year beginning on the date the property was placed in service, 94 percent at the end of the fifth year and 97 percent at the end of the sixth year; (2) a motion picture will be eligible for two thirds of the credit if not more than 94 percent of the cost of the film is depreciated at the end of the third year and 97 percent at the end of the fourth year; and (3) a motion picture will be eligible for one third of the credit if not more than 97 percent of the cost of the film is depreciated at the end of the second year. It is not clear to what extent these withdrawn Proposed Regulations and future Regulations which succeed them will be upheld.

The Tax Reform Act of 1976, discussed below, affords an opportunity to avoid the problem of estimating a useful life by permitting the taxpayer to elect to claim 40 percent or 66⅔ percent of the full investment tax credit for earlier years and 66⅔ percent of the full investment credit for future years, irrespective of actual useful life and irrespective of the amount of foreign source income.

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No. 84-402

In the Supreme Court of the United States

OCTOBER TERM, 1984

EMANUEL BARSHOV AND
JAMES E. ROSS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, defendants in a criminal tax shelter case, contend that they were denied a fair trial when the prosecutor in closing argument referred to a civil tax regulation that applied to petitioners' partnerships during the relevant period. The decision below is correct. Petitioners do not allege (nor is there) a conflict among the circuits or with any decision of this Court. There is no basis for further review.

1. After a jury trial in the United States District Court for the Southern District of Florida, petition-

ers Barshov and Ross were convicted of conspiracy to defraud the United States by impeding and impairing the Internal Revenue Service, in violation of 18 U.S.C. 371. In addition, Barshov was convicted on four counts and Ross on six counts of making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1); and Barshov was convicted on 15 counts and Ross on 13 counts of assisting in the preparation and presentation of fraudulent tax returns, in violation of 26 U.S.C. 7206(2). Barshov and Ross were fined $10,000 and $2,500, respectively. Each was placed on three years' probation, conditioned on his performance of a number of hours of uncompensated community service specified by the district court (R. 821-824).

The evidence at trial showed that petitioners were successful promoters of tax shelter limited partnerships, which included nine real estate tax shelters and six motion picture tax shelters (Tr. 395-414, 454-458, 472, 641, 695-696). Petitioners' activities in connection with two of their movie shelters, PAN Properties, Ltd. (PAN), and NAP Properties, Ltd. (NAP), gave rise to the indictment in this case.

In preparing for the syndication of the movie shelters, Barshov and his attorney, Murray, sought the advice of an expert named Schwartzman (Tr. 93-96). Schwartzman explained that nonrecourse financing was a fairly standard method of acquiring movies (Tr. 97, 114). He explained that, for purposes of depreciation, the tax "basis" of a film was generally the amount of cash paid plus the amount of any note given to the seller (Tr. 96). In no event, however, could the basis exceed the fair market value of the collateral, that is, the value of the film itself (*ibid.*). Schwartzman further explained that the accepted

method of depreciating films was the "income forecast method." Under that method, the depreciation deduction for a given year is computed by multiplying the film's basis by a fraction, the numerator of which is the film's income for that year, and the denominator of which is the film's income for that year plus the film's reasonably estimated future income (Tr. 101-102). If a film produced no income in a given year, the numerator of the fraction would be zero, and there would be no depreciation deduction for that year (Tr. 103).

Schwartzman also explained that film properties at that time qualified for an investment tax credit of 7% (Tr. 98). The credit was computed, in situations where the film had a useful life of at least five but less than seven years, by applying the 7% figure to an amount equal to two-thirds of the film's basis (Tr. 99). Relying on information furnished by Schwartzman and others, Murray wrote tax opinion letters for PAN and NAP indicating that the partnerships' films would qualify for the investment tax credit and that, for investment credit purposes, a film would be deemed to have a useful life of at least five years if accumulated depreciation at the end of three years did not exceed 94% of the film's basis (Tr. 689, 694; GX 47, 48; DX 5A, 12). This 94% "safe harbor" figure was derived from a proposed Treasury Regulation. See Prop. Reg. § 1.46-3(e)(7)(iv)(*b*) (1976), withdrawn, 42 Fed. Reg. 37829 (1977).

Barshov approached a movie distributor named Lang for assistance in locating and acquiring films for PAN (Tr. 236). Barshov told Lang that he wished to spend over $2 million on films for the partnership and that he wanted to pay 10% in cash and 90% in nonrecourse notes (Tr. 238, 265). Lang thereupon

purchased four films from another party for $375,000; the consideration Lang gave consisted of $175,000 in cash and a $200,000 nonrecourse note (Tr. 239-240, 311-313). Lang then sold the same four films to PAN for $2.89 million, receiving in return $290,000 in cash and $2.6 million in nonrecourse notes (Tr. 240, 269; GX 49). The notes were payable out of the films' net distribution revenues (*ibid.*).[1]

PAN considered that it had "paid" $2.89 million for the four films and used that figure as its tax basis for calculating investment credits and depreciation deductions (GX 2, 3, 5, 6, 49). The films generated substantial investment tax credits for the partnership's investors in 1973 (GX 9, 12, 29, 32, 35). For 1974 and 1975, PAN's partnership returns reported depreciation in the amounts of $1,072,808 and $66,533 respectively (GX 2, 3), amounts that were reflected in deductions by petitioners and the limited partners on their individual tax returns for those years. At the end of 1975, the third year of the films' useful lives, the films showed accumulated de-

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[1] Lang also helped acquire films for NAP, functioning in that respect in an agency capacity (Tr. 242). Lang arranged NAP's purchase of three films for $1.19 million, of which $1.05 million was evidenced by nonrecourse notes (Tr. 242-243, 314; GX 50). The seller's agent testified that there were no price negotiations over these films; Lang merely offered a price and the seller's agent accepted (Tr. 314-315). Lang received $98,000 in commissions out of the cash that NAP paid for these three films (Tr. 243-244, 314). NAP purchased a fourth film for $1.35 million, of which $1.2 million was evidenced by nonrecourse notes (Tr. 242). Lang had previously negotiated to purchase that film himself for $450,000 (Tr. 242), and had told petitioners a few days before NAP purchased it that he could have bought it for $150,000 (Tr. 307-308; DX 35).

preciation deductions equal to 93.99% of their asserted tax bases (Tr. 128; GX 59A). Despite the sizeable tax benefits that the films generated, their actual earnings were poor. For example, for the three-year period ending in December 1975, one of the films grossed only $1,883 and another only $538 (GX 55).

In order to compute their depreciation deductions under the income forecast method, petitioners supplied income projection figures to the films' distributor, who prepared income forecasts at petitioners' request (Tr. 176-177, 182, 191). These forecasts determined the denominator of the income forecast fraction (Tr. 102). The distributor also prepared producer's reports, detailing the play dates and the annual gross income for each film (GX 55). These reports determined the numerator of the income forecast fraction (Tr. 102). The distributor submitted the income forecast letters and producer's reports to petitioners, and petitioner Ross in return submitted them to PAN's accountants (Tr. 131, 133; GX 59).

In 1975, one of PAN's films and one of NAP's films had no play dates and generated no income (Tr. 144, 178-179). At petitioner Ross' direction, one of petitioners' employees called the distributor to tell him that "he better find some income" for the two films (Tr. 145). The distributor testified that either Barshov or Ross also called him and asked him to revise the reports for the two films to show "a small amount of activity" (Tr. 180). The distributor obliged by submitting revised reports showing fictitious play dates and gross income of $173.18 for one film and $124.13 for the other (Tr. 180; GX 55, 56).

2. Petitioners were indicted on one count of conspiracy and on multiple counts of substantive violations of the tax laws (Pet. App. 8). The government contended that petitioners had knowingly assigned inflated values to the films and thus fraudulently increased the films' tax bases for depreciation and investment credit purposes. In addition, the government contended that petitioners had fraudulently manipulated the income forecast method of depreciation by falsifying the films' actual and projected revenue (*id.* at 10).

At trial, the prosecutor in his summation noted that petitioners had been advised not to depreciate the films by more than 94% of basis during the first three years lest they jeopardize their investment tax credits (Tr. 778-779). This advice, as noted above, was grounded on a "safe harbor" provision in a proposed Treasury Regulation. See page 3, *supra*. The prosecutor further noted that petitioners had in fact depreciated PAN's films up to 93.99% of basis during the first three years, and that the amount of depreciation thus taken was largely in petitioners' discretion, since the denominator of the income forecast fraction was "purely subjective" and a mere "guess" that petitioner Ross had made (Tr. 779-780). Drawing upon these facts, the prosecutor argued that the consistent pattern of 93.99% accumulated depreciation was "too extraordinary a coincidence" to be mere happenstance (Tr. 788, 791). Rather, the prosecutor argued, this pattern showed that petitioners had fraudulently manipulated the income forecast method to maximize depreciation deductions yet maintain the desired level of investment credit, and had thus "used the law to their advantage to defraud the [g]overnment" (Tr. 774).

On appeal of their convictions, petitioners contended that they had been denied a fair trial by various instances of prosecutorial misconduct (Pet. App. 13). One such alleged instance involved the prosecutor's reference to the 94% depreciation limitation discussed above. Petitioners contended that "any reference to civil regulations relating to depreciation was improper in drawing inferences of criminal conduct" (*ibid.*). The court of appeals rejected this contention, noting that the government had not "attempted to prove a crime simply by proving a violation of civil law or regulations" (*id.* at 14) and that there was ample evidence of fraud to sustain the jury's verdict of guilty (*id.* at 11-12, 14).[2]

3. Petitioners reiterate their contention (Pet. 7-9) that the prosecutor's reference to the 94% limitation denied them a fair trial. They argue that this "safe harbor" provision was designed to require consistent depreciation, that the proposed regulation "required [them] * * * to depreciate the films in the very manner" that they did (Pet. 7), and that the prosecutor misled the jury into thinking that petitioners' "intent to comply with the 'safe harbor' regulation" evidenced an intent to defraud the government (*id.* at 8).

This contention is frivolous. The proposed regulation obviously did not *require* petitioners to depreciate the films at 94% of basis over three years. Rather, it *permitted* them to depreciate the films up to 94% of basis—assuming that such an amount of depreciation was otherwise justifiable—without forfeiting certain investment credit benefits. Whether

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[2] The court of appeals also rejected (Pet. App. 8-12, 14-28) a number of other arguments raised by petitioners, none of which they raise here. See Pet. i.

that amount of depreciation was justifiable, of course, depended on whether petitioners had properly applied the income forecast method by using accurate measures of present income and reasonable estimates of future income. The thrust of the government's evidence was that petitioners' estimates were not reasonable at all. Rather, the evidence showed that petitioners greatly overvalued the films, that they falsified the films' actual income, that they made unreasonable estimates of the films' future income, and that they claimed some $2.7 million in depreciation deductions—a figure that conveniently worked out to 93.99% of the films' asserted bases—during a three-year period in which the films grossed less than $10,000. The prosecutor's argument—that this pattern could not have been coincidental and must have been the product of intention and design—was clearly proper.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

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[3] Petitioners also suggest (Pet. 8), although they do not present it as a question for review (see Pet. i), that the prosecutor improperly referred to testimony of Murray and unidentified "other people" that the IRS had disallowed the partnership's deductions. This contention was considered and properly rejected (Pet. App. 14-15) by the court of appeals. It found the reference to Murray's testimony proper and the reference to the testimony of "other people" harmless error after "[e]xamining the remark in the context of the entire record" (*ibid.*). These highly factual issues do not merit this Court's review.

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NO. 84-402

in the Supreme Court of the United States

October Term, 1984

EMANUEL BARSHOV AND
JAMES E. ROSS,

Petitioners

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' RULE 22.5 REPLY BRIEF

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PETITIONERS' RULE 22.5 REPLY BRIEF

This Reply Brief addresses two arguments first raised in the Memorandum for the United States in Opposition (*Gov't*). First, the government argues that in the context of certain evidence, "[t]he prosecutor's argument – that

this pattern could not have been coincidental and must have been the product of intention and design—was clearly proper." *Gov't.* at 8. The government maintains that it was established in evidence ". . . that Petitioners had knowingly assigned inflated values to the films and thus fraudulently increased the films' tax bases for depreciation and investment credit purposes," *id.* at 6, that the Petitioners' estimates of projected revenue for purposes of the income forecast method of depreciation were unreasonable estimates, *id.* at 7-8, and that the Petitioners falsified income on two of its eight movies for tax year 1975. *Id.* Petitioners submit that the evidence did not establish what the government maintains, and in any event cannot render fair the prosecutor's argument.

Second, the government argues that the question of whether the prosecutor improperly referred to the IRS's civil disallowance of NAP's and PAN's deductions is not presented to this Court as a question for review. *Id.* at 8 n.3. Petitioners submit that they do present this question for review to this Court.

1. **The Evidence Cannot Justify the Prosecutor's Reference to the Safe Harbor Civil Tax Requlation**

   A. **The Prosecution Misled the Jury That the Petitioners' Compliance With the Safe Harbor Civil Regulation Was an Intent to Perpetrate a "Criminal Design."**

The government urges this Court to hold that it was fair for the prosecutor to argue that ". . . the consistent pattern of 93.99% accumulated depreciation was 'too extraordinary a coincidence' to be mere

happenstance," *id.* at 6, and therefore ". . . this pattern showed that Petitioners had fraudulently manipulated the income forecast method to maximize depreciation deductions yet maintain the desired level of investment credit, and had thus 'used the law to their advantage to defraud the [g]overnment.' " *Gov't.* at 6.

However, the premise of this argument, i.e., that the percentage amount and consistency of depreciation deductions on motion pictures are *coincidental*, was false. Indeed, the safe harbor civil tax regulation in question required the taxpayer to reasonably "manufacture" the denominator of the income forecast fraction (i.e., to *reasonably estimate* projected income of films) so as to fall within the imposed 94% percentage limitation of depreciation applicable to all of the motion pictures lest the taxpayer be penalized with respect to any motion picture for which the depreciation deduction exceeded the 94% limitation. Petitioners submit that the government should not have knowingly misled the jury to believe that the percentage amount and consistency of depreciation of motion pictures was a matter of chance, or "mere happenstance," for the purpose of proving that Petitioners manufactured a "criminal design," when in fact legislative committee reports and IRS regulations required the taxpayer to "manufacture" the amount of depreciation deductions within a percentage limitation applicable to all of the motion pictures in order to keep investment credits which were elected at NAP's and PAN's inception.

Nor does the record in this case establish that the Petitioners knowingly, or in fact, overvalued any films[1]

[1]The allegation of overvaluing was not even contained in the Indictment.

or provided false income or unreasonable estimates of projected income for purposes of the income forecast fraction so as to render the prosecutorial reference fair. It was because of this lack of evidence that the government's prosecutor resorted to the falsely-premised argument that the consistent pattern of 93.99% accumulated depreciation was "too extraordinary a coincidence."

B. The Income Forecasts Were Reasonable

The record fully supports that the estimates of the films' future incomes (which comprise the denominator of the income forecast fraction) were reasonable, *Gov't.* at 8, because the government's own witness testified that the income forecasts *were within the range of acceptable forecasts. Tr.* at 188-89, 199. This was the only evidence as to the reasonableness of the income forecasts. Therefore, the evidence proved that those projections were reasonable.

The government concedes that the safe harbor regulation ". . . *permitted* [the petitioners] to depreciate the films up to 94% of basis . . . ." *Gov't.* at 7. Since the projected range of future income was reasonable and generated a deduction within a range which encompassed 94%, *Gov't. Exhibit* 57, the taxpayers were entitled to depreciate PAN's films up to 93.99% in compliance with the safe harbor regulation.

C. The Petitioners Did Not Overvalue The Films

With respect to the PAN partnership, the government states that Lang[2] purchased four films from another party for $375,000, and then sold the same four films to PAN for $2.89 million, *Gov't.* at 4, which PAN "considered" that it had paid for the films. *Id.* However, Lang testified that he and Mr. Barshov had arms-length negotiations between themselves for the amount of cash and notes[3] to be paid by PAN to Freedom Records. *Tr.* at 269, 266, 265-68. Lang would not tell Barshov what Freedom Records had paid for the PAN movies even though Barshov's agent-attorney asked Lang what he had paid, *id.* at 720, and so Lang instead provided Barshov and his agents with certified costs of production and certified box office grosses which established that the terms of the sale were fair and realistic. *Id.* at 265-66. See Defendant's Exhibits 13-16.

With respect to the NAP films, the government states that the seller's agent testified that there were no price negotiations over these films, *Gov't.* at 4 n.1, and that NAP purchased one of those films for $1.35 million for which Lang had previously negotiated to purchase for $450,000 and had told Petitioners a few days before NAP purchased it that he could have bought it for $150,000. *Id.* The record does not support the government's assertion that the seller's agent testified that there were no price negotiations over NAP's films.

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[2]Actually, it was Lang's company, Freedom Records, Inc., which made the purchase.

[3]Pre-1976 law allowed the use of nonrecourse notes. *Tr.* at 686.

The seller's agent testified that "[t]he deal was proposed to me at the time" by Lang, *Tr.* at 315, because the seller (which had also sold to PAN through Freedom Records) found out that Freedom Records had resold the films to PAN for cash and the non-recourse notes and so the seller sold directly to NAP itself this time because the seller wanted the non-recourse notes. *Tr.* at 289. In fact, the seller almost fired its agent because he did not get the non-recourse notes from PAN. *Id.*

The record does not support the government's assertion that Lang had told Petitioners a few days before NAP purchased that he could have bought one film for $150,000. Nothing exists in the record citations provided by the government, *Gov't.* at 4 n.1, or anywhere else in the record, that Lang told the Petitioners a few days before NAP purchased a film that he could have bought it for $150,000.

Although the record does support the government's assertion that Lang had previously negotiated to purchase a NAP film himself for $450,000, Lang testified as to why the price that the Petitioners paid was fair market value. The $450,000 price negotiated by Lang was nine months before NAP purchased it and was set by an option and was upon different and more favorable terms to the seller than the price that NAP paid. *Tr.* at 519-22. What Lang told Petitioners a few days before NAP purchased it was that the film ". . . if handled and marketed properly, is worth several million dollars," and ". . . the firm price which was being arrived at being one million three hundred thousand dollars, I felt was fair, because it was my burden to obtain a good and proper distributor. . . ." *Id.* at 521-22. Indeed, Lang testified that this film was "re-negotiated." *Id.* at 242.

D. Evidence of False Playdates

Although the record supports the government's assertion that the distributor testified that Barshov or Ross[4] asked him to revise a report for each of two films to show "a small amount of activity," *Gov't.* at 5, it is also true that the record supported the Petitioners' assertion that the distributor had falsified the playdates without the Petitioners' knowledge, and was lying to protect himself from civil and criminal liability because the distributor was contractually obligated to the Petitioners to get a guaranteed number of playdates per year for all the movies, *Tr.* at 174-75, was granted immunity in exchange for his testimony, *id.* at 194, and was aware that he was under a current investigation by the Tax Division of the Department of Justice for omitting gross income on his own return about which he had refused to testify at a grand jury. *Id.* at 195-98. The Petitioners were not convicted for falsifying income of two movies for the tax year 1975, they were convicted for perpetrating a "criminal design" because the percentage amounts of the depreciation deductions of all four PAN movies were 93.99%, "too extraordinary a coincidence." In ". . . a case that could have been decided either way," *Tr.* (sentencing) at 3 (district judge speaking), the prosecutor's misleading reference to the safe harbor regulation convinced the jury to convict Petitioners for their lawful and required action of complying with the safe harbor limitations of the IRS regulations for all three tax years, 1973-75.

[4]The distributor testified that he could not remember which one he had talked to. *Tr.* at 179.

E. Conclusion

Petitioners submit that their convictions were based upon their lawful acts in conformity with a "safe harbor" civil tax regulation referred to by the prosecutor to prove a "criminal design," in combination with another reference to the IRS's disallowance of deductions where no evidence of such was introduced which reflected government disapproval of Petitioner's safe harbor acts. This deprived Petitioners of a fair trial.

2. Petitioners Have Presented for Review The Improper Prosecutorial Reference To The IRS's Civil Disallowance Of NAP and PAN Deductions

The government asserts that the Petitioners have not presented as a question for review that the prosecutor improperly referred to the IRS's civil disallowance of NAP's and PAN's partnerships deductions. *Gov't.* at 8.

"This Petition seeks review of a Court of Appeals opinion affirming a District Court decision denying a motion for mistrial made after the government's closing argument in which it sought to have the jury draw inferences of the defendant's[5] criminal intent by reference to the defendant's acts in conformity with a "safe harbor" civil tax regulation to prove a criminal design, in combination with a reference to the IRS's disallowance of certain deductions where no evidence of such was introduced." PET. at 1. The Petitioners have also stated in their Petition the facts at trial which they allege to be the prejudicial reference to the IRS's statutory

[5]When filed, the Petition for Writ of Certiorari applied only to Ross. Barshov timely joined the Petition later.

notice of deficiency. PET. at 5-6. The Petitioners submitted that the prosecutor's reference to the IRS's civil disallowance of deductions combined with the prosecutorial reference to the safe harbor regulation so as to deprive them of a fair trial and come within the rule of law enunciated in *United States v. Frade*, 709 F.2d 1397, 1392 (11th Cir. 1983). PET. at 7, 8. Therefore, Petitioners submit that the question of whether the prosecutor improperly referred to the IRS's civil disallowance of NAP's and PAN's deductions is presented to this Court for review.

3. **Conclusion**

For the special and important reason given in the Petition for Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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